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Supreme Court, U.S.
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No. 02-39

IN THE

Supreme Court of the United States

Micrel, Inc.,
Petitioner,

v.

Linear Technology Corp.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The proper construction of the on-sale bar of 35 U.S.C. 102(b) is fundamental to the validity of many of the approximately 1,000 patents that are sought in this country *every business day*. This case squarely presents the question whether the Federal Circuit fundamentally misinterpreted that provision when, on the basis of dictum in one of this Court's decisions, it overturned the settled rule that the commercial marketing of an invention triggers the obligation to apply for a patent. The Federal Circuit held instead that only a "formal offer for sale" that would be recognized as such under the Uniform Commercial Code suffices to trigger the obligation. The petition for certiorari demonstrated that the Federal Circuit's new legal standard conflicts with the longstanding precedent of both this Court and the regional circuits and moreover runs directly contrary to Congress's intent. Respondent does not even attempt to dispute the petition's showing that (1) the question presented is vitally important; (2) the choice between these purely legal standards would not benefit from further percolation; (3) this case will be essentially the only vehicle in which to decide it; and (4) the Court must in any event decide the issue sooner rather than later in order to avoid harm to those who will now defer applying for patents in reliance on the Federal Circuit's new standard. See Pet. 1-3, 26-27.

The arguments that respondent does make rest on obvious misstatements of both fact and law that only serve to further demonstrate that this case merits certiorari.

1. Respondent's arguments that this is not an appropriate case in which to decide the question presented run headlong into factual findings, made by the district court and affirmed by the Federal Circuit, which this Court (under the "two-court rule") will not disturb because respondent cannot, and does not, claim they are manifestly erroneous. See, *e.g.*, *NCAA* v. *Bd. of Regents*, 468 U.S. 85, 98 n.15 (1984).

First, respondent did engage in an array of commercial marketing prior to the "critical date" that easily suffices to invalidate respondent's patent under the "commercial

marketing" doctrine that the Federal Circuit embraced in *RCA Corp.* v. *Data General Corp.*, 887 F.2d 1056 (1989), but subsequently overturned in *Group One* v. *Hallmark Cards*, 254 F.3d 1041 (2001), *cert. denied*, 122 S. Ct. 1063 (2002).[1] Respondent's assertions to the contrary (see BIO 4-6) rest on unexplained citations to the district court's opinion that say nothing of the sort. The district court's extensive findings, entered under the heightened "clear and convincing evidence" standard and culminating in its conclusion that "LTC was actively promoting the LT1070 beyond the making of mere preparations for its sale" (Pet. App. 69a), speak for themselves. Petitioner is thus at a total loss to explain how respondent can possibly try to convince this Court that "the District Court did not find or conclude that LTC had offered for sale or sold the LT 1070 to any customer in the United States before the critical date" (BIO 7), when the *very issue* that the district court decided against respondent was – as it explained in the paragraph introducing the relevant conclusions of law – that "LTC made a commercial sale or offer for sale in the United States prior to the critical date" (Pet. App. 65a).

The Federal Circuit agreed. It concluded that, prior to the critical date, LTC was engaged in a "marketing blitzkrieg" (*id.* 4a) – *viz.* "extensive pre-release marketing activity designed to generate commercial interest" (*id.* 3a) – and thus was "actively promoting the LT1070 to customers" (*id.* 4a). See also, *e.g.*, *id.* 6a ("extensive pre-release marketing build-up"); *id.* 7a ("extensive promotional activities"). The upshot of these

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[1] There is no merit to respondent's suggestion (BIO 1) that cert. should be denied here because the Court denied cert. in *Group One*. The petition explained, and respondent just ignores, that the procedural posture of *Group One* – in which the lower courts had neither made factual findings nor reached any legal conclusions about whether the "on-sale" bar applied under the Federal Circuit's new legal standard – rendered that case inappropriate for review. See Pet. 26. Further, the extensive case law subsequently decided under the *Group One* standard and the fact that two cases presenting the issue are now pending before this Court (see No. 02-129, *Kustner Indus.* v. *Schreiber Foods*) demonstrate that the question presented is important and recurs frequently. See *Amici* Br. 9-10.

findings was that the Federal Circuit expressly "agree[d] with the district court that LTC's activities would have triggered the on-sale bar under the law as enunciated in *RCA Corp.*" *Id.* 12a.

Second, respondent's commercial marketing activities did occur "in the United States." Contra BIO 3. The settled rule is that marketing in this country will trigger the on-sale bar even if the customers are overseas (see *Robbins Co.* v. *Lawrence Mfg. Co.*, 482 F.2d 426, 434 (CA9 1973)), and the district court properly distinguished the one case respondent cites, in which "all [the] discussions occurred in Canada" (Pet. App. 71a (discussing *Synair Corp.* v. *American Indus. Tire Co.*, 223 U.S.P.Q. 1021 (S.D. Tex. 1983)). The district court thus took care to find the bar triggered only by marketing efforts in the United States: "These communications include the July 1985 sales conference [in California] attended by both domestic sales representatives and international distributors, the issuance of the November Newsline promising that the LT1070 will be a 'big hit,' and seminars conducted by LTC's inventor, Carl Nelson, during which he described the LT1070 directly to end-user customers."). Pet. App. 69a ¶ 26.

The district court considered marketing that did not "occur[] within the United States" not as sufficient to trigger the on-sale bar, but merely instead as confirmatory "evidence of contemporaneous efforts by [respondent] LTC to market the LT1070 prior to the critical date." *Id.* The Federal Circuit, in turn, recognized that the district court had properly limited the relevance of those promotional steps that were "not activities in the United States" (*id.* 8a), and agreed with the district court that the on-sale bar would apply under *RCA*, *inter alia*, because "LTC conducted a sales conference in Santa Clara, California, to which it invited both its domestic and international sales representatives" (*id.* 3a), and because "*domestic* sales representative first contacted end-user customers" (*id.* 8a (emphasis added and alteration omitted)).

2. Respondent's attempted defense of the decision below as compelled by the plain meaning of the phrase "on sale" also falls well short of the mark. Not even the Federal Circuit rests its test on the text of the statute. That is not surprising: Section 102(b)

makes no reference to an "offer for sale," much less a firm offer in the U.C.C. sense. When Congress intended to impose that requirement, it did so expressly. See Pet. 20 n.3 (discussing 35 U.S.C. 271(a), which deems a person who "offers to sell or sells any patented invention" an infringer). As petitioner's *amici* quite rightly explain (at 12): "while such niceties of offer and acceptance have a purpose in the context of contract confirmation – allowing different parties to cede or maintain control over final contract formation – they make no sense as applied to whether something is 'on sale' in the patent context."

Nor is it a surprise that the one dictionary and one case respondent cites as supposedly confirming that the on-sale bar only arises from "the act of offering something for sale" (BIO 8) say the opposite. The dictionary takes the broad view that an item is on sale if it is "in the market" (BIO 8 (quoting *Webster's Revised Unabridged Dictionary* (1913))), while the case, *Wende* v. *Horine*, states that the bar is triggered by "a placing 'on sale'" (BIO 7 (quoting 225 F. 501, 505 (CA7 1915))). Neither requires a "formal offer to sell," and both describe a situation in which (as in this case) the inventor is soliciting offers. Indeed, in *Wende*, the Seventh Circuit cited with approval its prior holding "that the *solicitation of orders* placed the invention 'on sale.'" *Timely Prods. Corp.* v. *Arron*, 523 F.2d 288, 301 (CA2 1975) (discussing *Wende*) (emphasis added). See generally *Amici* Br. 10-15 (addressing the statute's plain meaning).[2]

3. Respondent next fails to offer any persuasive defense of *Group One*'s contention that *Pfaff* v. *Wells Electronics*, 525 U.S. 55 (1998), impliedly rejected the Federal Circuit's prior precedent holding that commercial marketing triggers the on-sale bar. Neither the Federal Circuit nor respondent contends that the issue in this case was actually presented or briefed in *Pfaff*. Although respondent points out that *Pfaff* replaced the "totality of the circumstances" inquiry under the on-sale bar with

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[2] As a district court later described that court's rule, including under *Wende*, a formal offer for sale is not required: "an invention may be placed 'on sale' whenever its inventor engages in *any activity* to sell the patented idea, *including* making an offer for sale." *Zumbro, Inc.* v. *Merck & Co.*, 819 F. Supp. 1387, 1410 (N.D. Ill. 1992) (emphases added).

a two-part test (BIO 14), that holding does not implicate the settled rule that "commercial marketing" triggers the on-sale bar. This case – in which the district court applied *Pfaff* and found that respondent's extensive commercial marketing triggered the on-sale bar (see Pet. App. 63a-64a) – is a perfect illustration.

To the extent this Court in *Pfaff* touched on whether only formal contract activities rather than marketing efforts were sufficient to trigger the on-sale bar, it suggested the answer is "no" – the bar arises from "*[a]ny attempt to use [the invention] for a profit*" (*Pfaff*, 525 U.S. at 65 (quoting *Elizabeth* v. *Am. Nicholson Pavement Co.*, 97 U.S. 126, 137 (1878) (emphasis in *Pfaff*))) and from the inventor's efforts to "exploit his discovery competitively" (525 U.S. at 68 (quoting *Metallizing Eng. Co.* v. *Kenyon Bearing & Auto Parts Co.*, 153 F.2d 516, 520 (CA2 1946) (L. Hand, J.))). *Pfaff*'s statement of the issue presented also makes clear that this Court believed, or at least assumed, that Section 102(b) was triggered by "the commercial marketing of a newly invented product." 525 U.S. at 57.

Respondent conveniently addresses only the last of these statements. But its rejoinder that *Pfaff* merely used the word "commercial" to distinguish "experimental" sales – *i.e.*, that, "to constitute an invalidating bar, a sale or offer for sale must be primarily for commercial rather than experimental purposes" (BIO 15 (emphasis in original)) – only proves petitioner's point, for the Federal Circuit latched *entirely* on to *Pfaff*'s requirement of a "*commercial* offer for sale" as if that meant a formal U.C.C. offer. See *Group One*, 254 F.3d at 1047. In reality, as the petition explained (at 20) and as respondent essentially seems to admit, this Court simply intended to make clear that an offer for experimental purposes does not trigger Section 102(b). Unfortunately, that effort at clarity produced an unintended sea change in the law that only this Court can correct.

4. Nor is respondent correct that the *Group One* test is justified because this Court in *Pfaff* supposedly embraced "certainty" as the guiding principle of the on-sale bar. That argument does not accurately describe either *Pfaff* or the Federal Circuit's test.

First, *Pfaff* thus most certainly did *not* "observe[] that the purpose *of the on-sale bar* in the patent statutes was to 'fix a period of limitation which should be certain,'" as respondent misquotes the decision not once, not twice, but three times. BIO 2 (emphasis added), 13, 17. *Pfaff* actually says that the bar as originally enacted in 1836 "precluded patentability if the invention had been placed on sale at any time before the patent application was filed"; that "[i]n 1839, Congress ameliorated that problem by enacting a 2-year grace period in which the inventor could file an application"; and that – and this is the part respondent quotes entirely out of context – "the purpose of *that amendment* was 'to fix a period of limitation which should be certain.'" 535 U.S. at 65 (emphasis added). The 1839 amendment thus required the inventor to make sure that a patent application was filed "within two years from the completion of his invention." *Id.* The most that the Court was willing to infer from the amendment was that there is "*an interest* in providing inventors with a definite standard" (525 U.S. at 65 (emphasis added)), not that certainty is an overriding consideration under the statute. To the contrary, as the petition demonstrated (but respondent ignores), the statutory scheme – which embodies, for example, such inherently fact-bound concepts as the experimental use doctrine and the rule that offers and sales by persons other than the patentee can trigger the bar – cannot have been intended principally to further "certainty." See Pet. 24.

Rather, as the petition demonstrated and even respondent admits, *Pfaff* recognizes that the basic policies that "underlie Section 102(b) are 'excluding ideas that are in the public domain from patent protection and confining the duration of the monopoly to the statutory term.'" BIO 10 (quoting 525 U.S. at 64). It is precisely those policies that the Federal Circuit's new test – which (as in this case) allows an inventor to extend unilaterally the term of his patent by building up demand but not making formal offers or sales – defies. Respondent thus could not be more wrong when it baldly asserts that, under Section 102(b), it does "no[t] matter that such activities might advantage the inventor or suggest to the public that the idea is in the public domain" (BIO 11). See generally Pet. 22-26; *Amici* Br. 4-10.

Second, and in any event, the petition persuasively demonstrated that the Federal Circuit's "firm offer" standard produces no greater certainty than the prior "commercial marketing" rule. See Pet. 21-25. Respondent not only ignores that the old and new tests turn on fact-specific inquiries, but also is utterly incapable of explaining for this Court what uncertainty supposedly arises from a rule that the clock on filing a patent application begins to run when (a) the inventor exploits his invention by soliciting orders, or at least (b) when that exploitation causes the inventor to receive orders from others. In both instances, the facts relating to the bar are completely obvious to the inventor.[3] And it bears emphasizing that the patent law operated under this standard for more than a century (see Pet. 11 (citing *Plimpton* v. *Winslow*, 14 F. 919 (Cir. Ct. D. Mass. 1883)) without difficulty.[4]

5. The petition thus demonstrated that *Group One* departed markedly from the settled understanding that the on-sale bar is not limited to U.C.C. offers for sale but rather, as in this case, arises from attempts to market the invention commercially.[5]

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[3] The *Group One* case absolutely did *not* hold that "a customer's offer to buy, in response to advertisements or other solicitations of such offers by the patentee, could constitute an offer under Section 102(b)." Contra BIO 12 n.6. Respondent cites a page of that case (254 F.3d at 1041) that doesn't even include text from the opinion, but in any event the Federal Circuit firmly held that the "offers to buy the LT1070" that respondent received do not trigger the on-sale bar. Pet. App. 18a.

[4] Respondent badly misdescribes two of this Court's early nineteenth-century precedents as supposedly holding "that a definite offer to sell is required to raise the on-sale bar" (BIO 15 n.8). As both of the quotations respondent invokes make perfectly clear, those cases actually required *a sale* – *i.e.*, even a U.C.C. offer to sell would have been insufficient – for the simple reason that the on-sale bar did not then exist in its current form. *Pennock* v. *Dialogue*, 27 U.S. 1, 23 (1829), referred to the invention being "publicly sold for use," but the bar was not *even enacted* until seven years later, in 1836. *Consolidated Fruit-Jar Co.* v. *Wright*, 94 U.S. 92, 94 (1876), referred to an inventor who "vends [the invention] to others," but that case was decided under the 1839 version of the bar that referred to a "sale." See *Amici* Br. 12 n.5.

[5] Until *Group One*, the Federal Circuit adhered to these precedents. See Pet. 12. Respondent cites both *UMC Electronics Co.* v. *United States*,

Respondent notably does not dispute that such a change in the law, including particularly the law as articulated by the regional circuits before Congress created the Federal Circuit, is highly relevant to this Court's certiorari determination. See Pet. 10-11. Respondent's claim that the *Group One* test reflects longstanding law is simply wrong.

There are four objective indicia that *Group One* "changed the analysis" and adopted a "new legal standard." *First*, the Federal Circuit in this case itself stated *precisely* that (Pet. App. 2a) and furthermore confirmed that *RCA* "held" – as opposed to stated in *dicta* – that "commercial activity not rising to the level of a formal offer for sale could trigger the on-sale bar" (*id.* 7a). *Second*, the Manual of Patent Examining Procedure – which is published by the Patent Office, but has not yet been updated to account for *Group One* – expressly cites (under the heading "There Must Be No Attempt at Market Penetration Before the Critical Date") several decisions cited in the petition including the *RCA* as applying the commercial marketing doctrine. MPEP § 2133.03(e)(1) (title).[6] *Third*, respondent is completely unable to cite even a *single* case in the *history* of the on-sale bar from this Court, a court of appeals, or a district court holding that commercial marketing does not trigger the bar. *Fourth*, even *respondent* admits that under the law of several circuits that "any 'activity by the inventor or his company in attempting to

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816 F.2d 647, 656 (CAFC 1987), and *RCA*, 887 F.2d at 1062, as supposedly holding "that only a 'definite sale or offer to sell' raised the on sale bar" (BIO 2), but too conveniently omits that *RCA* explained – on the very same page and with the court of appeals' own emphasis – that "the requirement of a *definite* offer excludes merely indefinite or nebulous discussion about a possible sale," such that the on-sale bar may be triggered by "a patentee's commercial activity which does not rise to the level of a formal 'offer' under contract law principles." *Id.*

[6] Respondent's argument that petitioner is relying on a provision of the MPEP that addresses only "experimental use" (BIO 28) is not correct. MPEP Section 2133 addresses "Rejections Based on 'Public Use' or 'On Sale.'" Subsection (b) (cited by respondent) states that the bar is triggered when there has been an "offer for sale," but it is subsection (e)(1) (notably entitled "Commercial Exploitation") that explains what specific actions by the inventor trigger the one-year grace period.

sell the patented idea' was said to place the product on sale," acknowledging that this "test" was adopted by "[o]ther circuits, most notably the Seventh Circuit" but also "[t]he Ninth Circuit" and "[a] leading District Court case." BIO 21.

Having explicitly admitted that petitioner has properly described the rule in several circuits, respondent's attempt to parse and distinguish each of the cases cited in the petition is bound to fail. It is unnecessary to regurgitate the petition's discussion of each decision because respondent's methods of mischaracterization generally fall into discrete categories:

• The petition cites several decisions articulating the rule that commercial marketing triggers the on-sale bar.[7] Respondent agrees (see BIO 21) but argues that these cases did not, by their terms, involve merely marketing efforts. The petition never suggested to the contrary. Instead, these decisions demonstrate that the question presented merits serious consideration because the Federal Circuit has departed from the law as previously understood by the regional circuits.

• Respondent contends that, in two decisions affirmatively holding that marketing efforts trigger the bar, the courts found an "offer for sale."[8] That is *precisely* petitioner's point: these decisions, like *RCA*, found an "offer for sale" but did *not* limit that term to the niceties of the U.C.C.

• Respondent admits that two further cases did not involve U.C.C. offers but says that the courts found the bar triggered based on a "course of dealing" in that particular industry.[9] Again, that is precisely petitioner's point: that course of dealing would not suffice under *Group One* and it makes no sense to

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[7] *Amphenol Corp.* v. *General Time Corp.*, 397 F.2d 431 (CA7 1968); *Handgards, Inc.* v. *Ethicon, Inc.*, 743 F.2d 1282 (CA9 1984); *Robbins Co.* v. *Lawrence Mfg. Co.*, 482 F.2d 426 (CA9 1973); *In re Theis*, 610 F.2d 786 (USCCPA 1979).

[8] *D.L. Auld Co.* v. *Chroma Graphics Corp.*, 714 F.2d 1144 (CAFC 1983); *Minnesota Mining & Manufacturing Co.* v. *Kent Industries*, 409 F.2d 99 (CA6 1969).

[9] *Red Cross Manufacturing Corp.* v. *Toro Sales Co.*, 525 F.2d 1135 (CA7 1975); *Philco Corp.* v. *Admiral Corp.*, 199 F. Supp. 797 (D. Del. 1961).

limit the bar artificially to U.C.C. offers as the Federal Circuit has done.

• Respondent also argues that two cases in which the on-sale bar arose because the inventor distributed samples are properly regarded as involving "sales" rather than commercial exploitation.[10] That makes no sense: a "sale" is an exchange of a good for some consideration; in these cases, the products were given away in an attempt to generate business.

• Respondent notes that, in two further decisions holding that marketing efforts trigger the bar, the courts *also* found an on-sale bar because there was a formal offer or an actual sale.[11] That fact simply does not detract from the courts' separate holding that the inventors' attempts to exploit the invention were independently sufficient.

• Finally, respondent baldly asserts that two further decisions finding an on-sale bar on the basis of commercial marketing were confused and actually intended to apply the parallel "public use" bar.[12] There simply is no basis for that claim: both cases involved attempts at commercial exploitation, and that fact was central in the analysis of both courts.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the brief *amici curiae*, certiorari should be granted.

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[10] *American Can Co.* v. *Crown Cork & Seal Co.*, 693 F.2d 653 (CA7 1982); *George R. Churchill Co.* v. *American Buff Co.*, 365 F.2d 129 (CA7 1966).

[11] *Carborundum Co.* v. *Combustion Engineering*, 505 F. Supp. 1011 (D. Del. 1981); *Kalvar Corp.* v. *Xidex Corp.*, 384 F. Supp. 1126 (N.D. Cal. 1973).

[12] *L.F. Strassheim Co.* v. *Gold Medal Folding Furniture Co.*, No. 64-C-74, 1971 U.S. Dist. LEXIS 11001 (E.D. Wis. Nov. 1, 1971); *B.F. Goodrich Co.* v. *Aircraft Braking Sys. Corp.*, Nos. 91-48/91-515-SLR, 1994 U.S. Dist. LEXIS 21537 (D. Del. Nov. 10, 1994).

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